

GOODRIDGE vs. DEPARTMENT OF PUBLIC HEALTH (2003)
(Supreme Judicial Court of the State of Massachusetts)

Background

In March and April 2001, Hillary and Julie Goodridge (along with a number of gay or lesbian couples) applied for a marriage license in their local city or town hall, and were turned down by the clerk on the grounds that Massachusetts law does not permit same-sex marriages.

The Goodridges sued the Massachusetts Department of Public Health (which is in charge of marriage licensing), claiming that the relevant provisions of the marriage licensing statute violate their due process and equal protection rights under Article I and Article X of the Declaration of Rights of the Massachusetts Constitution.

When a Superior Court judge found for the Department of Public Health in 2002, the Goodridges appealed to the Supreme Judicial Court, which took the case and issued a 4-3 decision in November 2003.

Declaration of Rights

Article I. All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.

Marshall's Opinion

The issue is whether Massachusetts' ban on same-sex civil marriages violates the due process and equal protection guarantees in the Declaration of Rights.

Precedents dictate that state infringements of both equal protection and due process are subject to **Strict Scrutiny** when a fundamental right and/or suspect classification is at stake, and are subject to **Rational Basis Review** in all other cases. (p. 555)

[Notice that, under Article I of the Declaration of Rights of the Massachusetts Constitution, sex-based classifications are treated in the same way as race-based

classifications. Both are subject to Strict Scrutiny. In this way, sex-based classifications must comply with a higher standard of judicial review at the state level than they do at the federal level.]

As in federal law, a MA state statute passes the strict scrutiny test only if it is necessarily related to a compelling government interest, and passes the rational basis test only if it is rationally related to a legitimate government interest.

Marshall argued that there is no need to discuss which of these standards should be held to apply, since the same-sex marriage ban fails the Rational Basis test, and hence fails the Strict Scrutiny test as well. (p. 555)

Marshall on What's at Stake

“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return, it imposes weighty legal, financial, and social obligations.” (p. 550)

The institution of marriage at issue here is the legal institution of civil marriage, not the religious institution of holy matrimony. [This is important: In public debates, the two forms of marriage are easily confused.] Judicial revocation of the same-sex ban in the area of civil marriage does not entail judicial revocation of the same-sex ban in the area of religious marriage.

Benefits of Civil Marriage (pp. 552-553)

Property Rights

- Income Tax (joint)
- Inheritance (no probate required)
- Protection against creditors
- Homestead protection
- Entitlement to deceased spouse's pension
- Health Insurance
- Veterans' spousal benefits

Other benefits

- Presumption of legitimacy and parentage of children
- Prohibition of spouses testifying against one another
- Decisions regarding health/life support for disabled/incompetent spouse

Predictable rules governing child visitation, support, etc. in case of divorce
Marital children benefit from family stability and economic security

Marshall on Rational Basis Review

In MA due process law, the **Rational Basis** test requires that the relevant statute “bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare”. (p. 555)

Massachusetts’ Justification of the Same-Sex Marriage Ban

Ends

1. Providing a favorable setting for procreation
2. Ensuring the optimal setting for child rearing
3. Preserving scarce state and private financial resources

The claim in each case is that the end is legitimate and the same-sex marriage ban is rationally related to the end.

Marshall agrees that these three ends are legitimate, but denies that the same-sex marriage ban is rationally related to any of them.

a. Procreation

The ability or intent to procreate is neither necessary nor sufficient for marital eligibility. The only precondition of marriage is “the exclusive and permanent commitment of the marriage partners to one another.”

b. Child Rearing

Restricting marriage to opposite-sex couples “cannot plausibly further” the legitimate state interest in protecting the welfare of children.

The state already protects children in many different ways, no matter the circumstances of their birth. For example, in cases of divorce or adoption, the relevant standard is the “best interests of the child”: the sexual orientation or marital status of a parent is legally irrelevant. (p. 556)

There is no evidence to suggest that the same-sex marriage ban “will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.” (p. 556)

The state already concedes (e.g., through its adoption laws) that same-sex couples may be “excellent” parents. (p. 556)

c. Preserving Scarce Resources

The same-sex marriage ban “bears no rational relationship to the goal of economy.”

There is no evidence that same-sex couples are less financially dependent on each other than are opposite-sex couples.

The benefits of marriage are available to all opposite-sex couples, regardless of their degree of financial independence.

Other Possible Justifications for the Same-Sex Marriage Ban

a. Revoking the ban will destroy the historical institution of civil marriage.

* The Goodridges want the benefits and burdens of the historical institution. They do not seek to undermine it. In fact, extending the institution to cover same-sex marriage will, if anything, *reinforce* it.

* If revoking the ban on *interracial* marriage didn’t destroy the institution of marriage, why think that revoking the ban on *same-sex* marriage will destroy the same institution? [Notice that the institution of marriage has survived both expansion of the rights of married women and the introduction of no-fault divorce.]

b. Only the legislature has the power to control the boundaries of civil marriage.

* This is false. State Courts have the power to decide whether acts of the State Legislature violate provisions of the State Constitution. If the same-sex marriage ban bears no rational relation to a legitimate state interest, then it is unconstitutional, period.

c. Revoking the ban will lead to interstate conflict.

* So be it. That is just the logical consequence of federalism, namely that “each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.”

d. The ban reflects community consensus that homosexual conduct is immoral.

* This is not in fact the consensus of the community, at least as this is measured by existing State statutes, many of which proscribe discrimination of grounds of sexual orientation.

[Greaney's Concurrence]

Greaney argues that the same-sex marriage ban is predicated on sex-based classification, which (on traditional equal protection grounds) is *suspect*, and hence subject to Strict Scrutiny. Moreover, the ban infringes a *fundamental* right, namely the right to marry a person of one's choice, and hence is subject to Strict Scrutiny on traditional due process grounds. (p. 560)

Greaney agrees with Marshall that the marriage ban fails the Rational Basis test. He concludes that the ban must then fail Strict Scrutiny as well.

Greaney's outlook is self-consciously that of a "moral theory" theorist: "Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do." (p. 561)

[Evaluation of Greaney's Concurrence]

The same-sex marriage ban is not predicated on sex-based classification. The ban burdens men and women equally, since it prohibits marriage between two men as much as it prohibits marriage between two women. The ban, therefore, does not represent a form of *sex discrimination*. (See Cordy's dissent, under (B)—at p. 567-568.)

However, I see no reason to deny Greaney's claim that the right to marry whom one pleases (within certain bounds, established by considerations relevant to the giving of informed consent) is fundamental. The choice of whom to marry is one of the most fundamental expressions of one's individuality. The choice is intimately bound up with one's "life plan," and nothing could be more important than the parameters that define the major institutional structures that determine the shape of one's future.

Cordy's Dissent

The same-sex marriage ban does not infringe any fundamental right, and is not predicated on any suspect classification. Therefore, the proper test to apply is Rational Basis review, which requires that the ban be rationally related to a legitimate state interest. In this case, the state's purpose (call it "P") is that of "ensuring, promoting, and supporting an optimal social structure within which the bear and raise children". P is clearly legitimate (perhaps even compelling). Moreover, the ban is rationally related to P inasmuch as "a *conceivable* rational basis exists on which the Legislature *could* conclude" that the ban furthers P. (p. 571)

Why the Same-Sex Marriage Ban Infringes no Fundamental Right

a. The proper definition of “marriage” is as a “union between one man and one woman”. It follows directly from this definition that same-sex couples have no right to marry, period. (p. 563)

[This is a terrible argument. With respect to interracial marriage, one could just as easily argue (and just as unpersuasively) that the proper definition of “marriage” in 1967 was as a “union between one man and one woman *of the same race*”. Moreover, Marshall offers up a different definition of “marriage” as a “lifelong and exclusive commitment between two persons”. What reasons are there to privilege the *traditional* definition over Marshall’s definition? Ultimately, the real question is not a semantic one. At issue is whether there is a fundamental right to enter into a lifelong and exclusive relationship with another person, where both individuals are capable of providing informed consent to the union. This question cannot be settled by looking at the use of language. It can only be settled by moral theory.]

b. The proper criterion of fundamentality is historical, not moral. Whether a right counts as fundamental depends on whether it is “deeply rooted in our history and traditions” (p. 565). But even if same-sex couples have the right to marry, that right is certainly not “deeply rooted in our history and traditions”. Consequently, this right is not fundamental.

[This argument simply ignores the *Palko* criterion of fundamentality, which is that of being “implicit in the concept of ordered liberty”. The relevant question, at least from the point of view of moral theory, is whether the failure to respect a same-sex couple’s right to marry is a form of discrimination that has no place in a just society.]

Why the Same-Sex Marriage Ban is not Based on a Suspect Classification

See Evaluation of Greaney’s concurrence above.

Why the Same-Sex Marriage Ban is Rationally Related to a Legitimate State Purpose

In order to pass the Rational Basis test, there need only be a *conceivable* rational basis on which the legislature *could* conclude that the relevant law furthers a legitimate purpose. Here, the legitimate purpose is that of ensuring, promoting, and supporting an optimal social structure within which the bear and raise children. Since it is *conceivable* that same-sex families are not *optimal* from the child-rearing point of view (i.e., since it is *possible* that sociological evidence of non-optimality *could* be found), the same-sex marriage ban passes the Rational Basis test.

[The “conceivability” version of the Rational Basis test is so weak as to render the test completely toothless. It will (almost) *always* be possible to find a *merely possible* relationship between a law and an articulated legitimate state interest. For example, it is surely *conceivable* (perhaps even *actual*) that interracial families are not optimal from the child-rearing point of view. But surely this sort of reasoning is insufficient to conclude that anti-miscegenation laws pass the Rational Basis test.]